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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 165

TAMPA TIMES COMPANY AND THE TRIBUNE COMPANY,

Appellants,

vs.

CITY OF TAMPA, A MUNICIPAL CORPORATION

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT—Filed May 16, 1947

In the judgment appealed from, the Supreme Court of Florida, the highest appellate Court of that State, held that a certain ordinance of the City of Tampa was valid and enforceable as against the plaintiffs' contention that such ordinance violates the guaranties of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

On September 15, 1942, the Board of Representatives of the City of Tampa, Florida, adopted Ordinance No. 856-A, the pertinent portion of which reads as follows:

> "That a license tax be, and the same is hereby levied upon and shall be collected from every person, firm, or

corporation exercising the privileges of carrying on or engaging in the businesses, professions, or occupations hereinafter specifically enumerated, as fixed hereinafter; each of said amounts, unless otherwise specifically stated, being the amounts payable as a license tax for exercising such privilege or carrying on or engaging in such business, profession or occupation mentioned for the year beginning October 1st, A. D. 1942, and for each succeeding year thereafter, and it shall be unlawful for any person, firm or corporation to carry on or engage in any business, occupation or profession herein prescribed and designated without having first paid the license tax provided herein and/or complied with the terms hereof, as follows: to-wit:

(e) Newspaper employing 5 employees or less $25.00
For each additional employee over 5, per employee ..... 4.00."

Among other license taxes ordained by the Board of Representatives of the City of Tampa, based upon number of employees, is the following:

"Motor Vehicle Repair Shops:

Where not more than one mechanic is employed $25.00
For each additional mechanic, foreman or helper there shall be paid in addition thereto 3.00

Barber Shops:

One chair 6.00
Each additional chair 2.50

Cigar Factories:

Each cigar factory 5.00
For each person in excess of 5 persons employed at one time ..... .50
Provided said license shall not exceed $250.00."

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On December 21, 1943, the plaintiffs, Tampa Times Company and The Tribune Company, exhibited their bill of complaint in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, against the City of Tampa. The bill avers that the plaintiffs are the publishers, respectively, of *Tampa Daily Times* and *Tampa Morning Tribune*, newspapers having an aggregate average daily circulation in excess of 120,000 copies in the City of Tampa and the surrounding area. The bill further avers that it is the purpose of the plaintiffs in publishing their respective newspapers to provide the general public with information and intelligence concerning events occurring in the City of Tampa, the State of Florida and the world as a whole, and particularly, to keep the public informed concerning the policies and practices of governmental bodies and agencies, national, state and local. It is further averred that as free members of the press, plaintiffs exercise a salutary influence for better government through the publication of their respective newspapers and do much to maintain the integrity and sustain the energy of officials and agencies charged with the execution of the functions of government in the City of Tampa.

The bill avers that the foregoing ordinance was not passed as a regulatory measure under the police power but was enacted to raise revenue for general municipal purposes and with the intention on the part of the defendant to use the license tax imposed thereby as an instrument for restricting and curtailing the circulation of the respective newspapers of the plaintiffs. The bill further avers that, to enforce such intention, the ordinance purports to make a failure to pay the tax a criminal offense, punishable by fines, imprisonment, or both, and further purports to make each day's publication of the respective newspapers of the plaintiffs without compliance with such ordinance a separate offense.

The bill avers that in the publication of their respective newspapers, each of the plaintiffs employs a large staff of trained employees for the purpose of editing and composing such newspapers and printing and distributing copies thereof. It is further averred that the number of persons employed by the plaintiffs to perform such operations depends upon the circulation of their respective newspapers, and that the ordinance, therefore, attempts to levy a tax upon the plaintiffs which is in direct proportion to, and based upon, the circulation of their respective newspapers and which will increase in absolute ratio to any increase in circulation.

The bill avers that, in addition to the newspapers published by the plaintiffs, there are at least five other newspapers published in the City of Tampa. It is averred that less than five persons are employed in the publication and distribution of each of such other newspapers, and under the terms of the ordinance, each is subjected to a license tax of only $25.00. It is further averred that the publishers of all such other newspapers are in direct competition with the plaintiffs in that they derive their incomes from the same sources as the plaintiffs, that is, from the sale of copies to the general public and from the sale of advertising space therein. The bill further avers that the plaintiff, Tampa Times Company, had in its employ one hundred and thirty-two employees as of October 1, 1943, and under the terms of the ordinance would be subjected to a license tax of $533.00; that the plaintiff, The Tribune Company, had in its employ one hundred and eighty-five employees as of October 1, 1943, and under the terms of the ordinance would be subjected to a license tax of $745.00 for the license year beginning on that date. It is further averred that the license tax imposed upon the plaintiffs is, therefore, twenty-two times and thirty times, respectively, greater than the tax levied against any competing newspaper.

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The bill avers that the defendant does not incur a greater expenditure in policing and regulating the publications of plaintiffs' respective newspapers than is incurred in policing and regulating the operation of any of the other places of business taxed upon the basis of the number of their employees, and that no greater benefits accrue to the plaintiffs from the performance of governmental functions than accrue to any of such other places of business. The bill further avers that the tax imposed upon each of the plaintiffs is, nevertheless, substantially greater than that levied upon any other business taxed upon the same basis, and is, at least, eight times as great as that levied upon certain of such other businesses.

The bill of complaint prays that an injunction issue to prevent the defendant from collecting or attempting to collect the license tax and from enforcing the provisions of the ordinance against the plaintiffs.

The City of Tampa filed its answer containing a motion to dismiss the bill of complaint and the motion was granted by the Chancellor upon the general ground that the bill failed to state a cause of action. The plaintiffs declined to amend, and the cause of action was dismissed with prejudice. The plaintiffs appealed to the Supreme Court of Florida, and the order of the Chancellor was affirmed by that Court.

The opinion of the Supreme Court of Florida was handed down on February 18, 1947, and petition for rehearing was filed by the plaintiffs within the time allowed by the rules of the Supreme Court of Florida on March 4, 1947. After duly considering the petition, the Supreme Court of Florida entered its order on March 24, 1947, denying the petition, and issued its mandate to the lower Court on the same day. Application for appeal was presented to the Honorable Elwyn Thomas, Chief Justice of the Supreme Court of

Florida, on May 16, 1947, and order allowing appeal was entered on that date. Copy of the opinion of the Supreme Court of Florida, dated February 18, 1947, copy of the opinion of the Court in the companion case under the same style, designated as case No. 73704-C, and copy of the order denying petition for rehearing, dated March 24, 1947, are attached hereto.

This appeal to the Supreme Court of the United States is filed under the provisions of Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344 (a); 8 F. C. A., Title 28, Section 344 (a)), reading as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question • • • the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

It has been held repeatedly by the Supreme Court of the United States that this section applies to cases in which the highest Court of a State has held in favor of the validity of a municipal ordinance as against the contention that such ordinance violated provisions of the Constitution of the United States. See *Zacht* v. *Kain*, 260 U. S. 174, 67 L. Ed. 194, 43 S. Ct. 24; *King Manufacturing Co.* v. *Augusta*, 277 U. S. 100, 72 L. Ed. 801, 48 S. Ct. 489; *Jamison* v. *Texas*, 318 U. S. 413, 87 L. Ed. 869, 63 S. Ct. 669; *Largent* v. *Texas*, 318 U. S. 418, 87 L. Ed. 873, 63 S. Ct. 667.

No evidence was taken in the cause and only the question of the legal sufficiency of the bill of complaint is presented. In affirming the order of the Chancellor, the Supreme Court of Florida held that the ordinance did not violate the First and Fourteenth, or the Fourth, Amendments to the Con-

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stitution of the United States under the facts as stated in the bill of complaint. The contentions made by the plaintiffs in the Supreme Court of Florida were:

1. That the action of the defendant in levying a tax upon the right and privilege of the plaintiffs to print and publish their respective newspapers is a violation of the provisions of the First Amendment to the Constitution of the United States guaranteeing freedom of the press, as made applicable to the various States and their political subdivisions by the Fourteenth Amendment;

2. That the tax is, in fact, a tax upon the volume of circulation of the plaintiffs' respective newspapers in that the number of persons employed in the publication and distribution of such newspapers is in direct proportion to, and is a function of, their circulation, and increases in absolute ratio to any increase in circulation, and that, consequently, the tax abridges the freedom of the press.

3. That the provisions of the ordinance imposing license taxes upon the plaintiffs in amounts which are thirty times and twenty-two times, respectively, greater than the amount levied on any competing newspaper, and which are determined by a rate up to eight times greater than the rate for other places of business taxed upon the same basis, constitute a violation of the provisions of the Fourteenth Amendment to the Constitution of the United States guaranteeing equal protection of the law and forbidding the taking of property without due process of law.

The Supreme Court of Florida considered these contentions in its opinion, and held that the ordinance did not violate any of the provisions of the Constitution of the United States. In support of their first contention, the plaintiffs cited the following cases: *Grosjean* v. *American*

Press Company, 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444; *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. Ed. 949, 58 S. Ct. 666; *Schneider* v. *Irvington*, 308 U. S. 147, 84 L. Ed. 155, 60 S. Ct. 146; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 87 L. Ed. 1292, 63 S. Ct. 870; *Follett* v. *McCormick*, 321 U. S. 573, 88 L. Ed. 939, 64 S. Ct. 717; *Thomas* v. *Collins*, 323 U. S. 516, 89 L. Ed. 430, 65 S. Ct. 315. The Supreme Court of the United States held in deciding those cases that the First Amendment to the Constitution of the United States constitutes a grant of certain privileges to all and that such privileges may be exercised by virtue of such grant free from the power of taxation or license by the Congress or any other legislative authority. The substance of the doctrine advanced by the Court is that the four great freedoms guaranteed by the First Amendment, freedom of speech and of the press, freedom of religion and the right of assembly, stand in a preferred position and that the mandate of the amendment that the exercise of these freedoms shall be guaranteed free to all prohibits the restriction thereof by government through taxation, license or other instrument of oppression.

To support their second contention, the plaintiffs relied upon the case of *Grosjean* v. *American Press Company*, 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444. In that case, the Supreme Court of the United States held that a statute of the State of Louisiana, having provisions similar to those in the ordinance enacted by the City of Tampa, imposed an unconstitutional restriction upon freedom of the press. The Court said in its opinion that the intention of the State of Louisiana to suppress the newspapers of the publishers involved was a necessary implication from the provisions of the statute. In the case at bar it was alleged in the bill of complaint, and admitted by the motion to dismiss, that the defendant intended to use the ordinance and the tax

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imposed thereby as an instrument for the suppression of the plaintiffs' newspapers. This admission in the case at bar makes the action of the City of Tampa a much clearer and more certain violation of the Constitutional amendments than was presented in the *Grosjean* case.

In support of their third contention, the plaintiffs cited the following cases: *American Press Co.* v. *Grosjean,* 10 F. Supp. 161; *Roach* v. *Ephren,* 82 Fla. 523, 90 So. 609; *Dusenbury* v. *Chesney,* 97 Fla. 468, 121 So. 567; *City of De Land* v. *Florida Public Service Co.,* 119 Fla. 804, 161 So. 735; *State ex rel. Cole* v. *Keller, Tax Collector,* 129 Fla. 276, 176 So. 176; *Smith* v. *City of Tampa,* 136 Fla. 98, 186 So. 674; *State ex rel. James* v. *Gerrell,* 137 Fla. 324, 188 So. 812; *Gillett* v. *Colson,* 144 Fla. 438, 198 So. 109. Those cases advanced the doctrine that municipal ordinances passed for the purpose of raising revenue and not as regulatory measures under the police power are subject to the test of reasonableness when attacked in the courts; that any differences in the amounts of excise taxes must be based upon differences in the cost of police protection, modes of doing business, the burden imposed upon the municipality in enforcing the license law, or upon some other just and reasonable basis. Arbitrary levies greatly exceeding in amount levies upon competing places of business, or upon other businesses where there is no reasonable basis for classification in the cost of regulation of the business, the manner in which it is conducted, or the cost of enforcement, are deemed to deny equal protection of the law and to deprive the taxpayer of property without due process by the decisions.

All of the issues presented by this appeal raise substantial questions of conflict between the provisions of the ordinance and the Constitution of the United States. These questions having been resolved in favor of the validity of

the ordinance in the Supreme Court of Florida, the ultimate decision lies within the appellate jurisdiction of the Supreme Court of the United States.

CHESTER H. FERGUSON,
MACFARLANE, FERGUSON, ALLISON & KELLY,
Attorneys for Appellants,
Tampa, Florida.

APPENDIX "A"

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1947

En Banc

Hillsborough County. Circuit Court No. 69015-C

Tampa Times Company, a Corporation, and The Tribune Company, a Corporation, Appellants,

vs.

City of Tampa, a Municipal Corporation, Appellee

Opinion—Filed February 18, 1947

An Appeal from the Circuit Court for Hillsborough County, Harry N. Sandler, Judge

McKay, Macfarlane, Jackson & Ferguson, Howard P. Macfarlane and T. Paine Kelly, Jr. for appellants

Karl E. Whitaker and Ralph A. Marsicano, for appellee.

Per Curiam:

Affirmed on authority of Tampa Times Company and The Tribune Company *v.* City of Tampa this day filed.

Thomas, C. J., Terrell, Buford, Chapman, Adams and Barns, J. J., concur.

APPENDIX "B"

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A. D. 1947

EN BANC

Hillsborough County. Circuit Court No. 73704-C

TAMPA TIMES COMPANY, a Corporation, and THE TRIBUNE COMPANY, a Corporation, Appellants,

vs.

CITY OF TAMPA, a Municipal Corporation, Appellee

OPINION—Filed February 18, 1947

An Appeal from the Circuit Court for Hillsborough County, Harry N. Sandler, Judge

McKay, Macfarlane, Jackson & Ferguson, Howard P. Macfarlane and T. Paine Kelly, Jr., for appellants.

Karl E. Whitaker and Ralph A. Marsicano, for appellee.

ADAMS, J.:

The Tampa Times Company and The Tribune Company filed a bill in equity alleging that they are the publishers of daily newspapers in the City of Tampa with a combined circulation in excess of one hundred twenty thousand daily copies. They allege that they are institutions known as "the press" within the meaning and contemplation of the Federal and State Constitutions. Their prime objective and purpose is to collect and disseminate news of general interest and benefit to the public.

The bill sets forth pertinent parts of two ordinances enacted by the City of Tampa which, it is claimed, violate certain rights vouchsafed to appellants under both the Federal and State Constitutions guaranteeing freedom of the press. The pertinent parts of Ordinance No. 964-A read:

> " 'Section 1. That an annual license tax, be and the same is hereby levied upon and shall be collected from

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every person, firm or corporation, exercising the privileges for carrying on or engaging in the businesses or occupations hereinafter specifically enumerated and in the amounts as follows:

(a) Newspapers, magazines, or other periodicals or publications published within the City of Tampa, on gross receipts from all sales and advertising, shall pay the same license tax as now provided for merchants by Paragraphs (b) and (c) of Sub-Section 62 of Section 1 of Ordinance No. 721-A of the City of Tampa, as amended by Section 2 of Ordinance No. 897-A; * * *.' "

" '(B) Merchants—Retail: The license tax on every retail merchant, whether any other license tax is required by any sub-section of this ordinance or not, shall be measured by the amount of gross sales made by such merchant and shall be figured and arrived at as follows: Returns shall be made to the City Tax Collector showing the amount of gross sales for the 12 months period ending September 30th, immediately preceding the license year, or as otherwise provided for herein, and on the first $3,000.00 or less the license tax shall be.....$10.00.

On each $1,000.00 of gross sales or major fraction thereof above $3,000.00.....$1.00.

(C) Merchants—Wholesale: The license tax on every wholesale merchant, whether any other license tax is required by any sub-section of this ordinance or not, shall be measured by the amount of gross sales made by such merchant and shall be figured and arrived at as follows: returns shall be made by each wholesale merchant to the City Tax Collector showing the amount of gross sales for the 12 months period ending September 30th, immediately preceding the license year, or as otherwise provided for herein, and on each $1,000.00 of gross sales so made the license tax shall be.....30

The minimum amount of tax shall be.....10.00.' "

One provision of Section 3 of Ordinance No. 721-A reads:

> "'and the Tax Collector is authorized to propound interrogatories and to furnish forms for the filing of the returns and to require the giving of any information necessary to enable him or his authorized deputy to determine the proper amount of license due, and the Tax Collector or his authorized deputy is authorized to make such investigation and inspection of the place of business and records of the person required to pay a license as he may determine necessary in order to verify any returns or determine the proper license amount * * *'"

The bill alleges that almost all of appellants' income is derived from sales of their papers to the general public and the sale of advertising space; that the latter income is largely determined by the volume of circulation and the natural effect of the ordinances is to illegally restrain the press. It is further asserted that the effect of the last quoted ordinance is to curtail the flow of information of a public nature to the press.

The bill prayed that the ordinances be declared void in so far as they applied to appellants.

On motion the bill was dismissed and appellants appeal.

The first amendment of the Constitution of the United States reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; of abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances."

The pertinent part of Section 13 of the Declaration of Rights, Florida Constitution reads:

> "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press. * * *"

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Appellants rely in a large measure on Grosjean *v.* American Press Company, 297 U. S. 233, 80 L. Ed. 660; Murdock *v.* Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A. L. R. 81; Follett *v.* Town of McCormich, 321 U. S. 573, 64 S. Ct. 717, 88 L. Ed. 938, 152 A. L. R. 317; Bridges *v.* California, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192; Lovell *v.* Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; City of Tampa *v.* Tampa Times Company, 153 Fla. 709, 15 So. 2d. 612.

The City relies mostly upon the cases, Arizona Publishing Company *v.* O'Neil et al., 304 U. S. 543, 58 S. Ct. 950, 82 L. Ed. 1518; Giragi *v.* Moore, 48 Ariz. 33, 58 Pac. 2, 1249; 110 A. L. R. 314; On rehearing Giragi *v.* Moore, 49 Ariz. 74, 64 Pac. 2d. 819, 110 A. L. R. 314; Arizona Pub. Co. *v.* O'Neil et al., D. C., 22 F. Supp. 117; Commonwealth of Massachusetts *v.* Boston Transcript Co., 249 Mass. 477, 144 N. E. 400, 35 A. L. R. 1; Cooley on Taxation, Vol. 4, 4th Ed., § 1707, page 3421.

The ordinance in question is for revenue. There is no claim that it is arbitrary or harsh in nature. The single question then is whether a newspaper is immune from the burden of taxation to maintain government. We might begin our consideration by referring to the case where these same appellants were the victors over the same defendant in the case of City of Tampa *v.* Tampa Times, 153 Fla. 709, 15 So. 2d 612, involving a different ordinance. There we held the ordinance in question was bad because the license tax was graduated according to volume of circulation. We based our judgment upon authority of Grosjean *v.* American Press Company, supra, and distinguished the case from that of Giragi *v.* Moore, supra, and Arizona Pub. Co. *v.* O'Neil et al., supra. Now we have an ordinance which takes this case out from under the rule in Grosjean *v.* American Press Company, supra, and brings it squarely under the rule in Arizona Pub. Co. *v.* O'Neil et al., supra.

The contentions of both parties are directed to the most fundamental rights and privileges secured to our citizens by the Constitutions of our State and Nation. The right of a free press is an American concept of law without dissent. Likewise is "equality before the law" which comprehends equality in responsibility for government as well

as equality in the enjoyment of privileges flowing from a stable government.

Our Constitution requires the legislature to provide for a uniform and equal rate of taxation. Article IX, Section 1. The legislature shall authorize the several municipalities to impose taxes for municipal purposes upon principles established for state taxation. Article IX, Section 5. The property of all corporation (with certain exceptions which do not apply to appellants) shall be subject to taxation. Article XVI, Section 16.

Freedom of the press is almost as old as printing. It, like its older brother freedom of speech, is indispensable to free government. We cannot circumscribe or definite it, yet great scholars and jurists have filled libraries with dissertations thereon. Freedom of the press is, in truth, an ideal to which all lovers of liberty may strive in order to maintain free government in an ever changing society. Its importance cannot be magnified too much. It is not enough to say that freedom of the press is a cornerstone of free government. *It is, in fact, a prerequisite to free government.* Yet, in view of all that, it is no governmental functionary. It exercises no governmental power, neither does it perform any. It makes no law, neither does it interpret, administer or enforce any although it may wield a great influence on all. It is clothed with no power to rule, yet it is and must remain a free institution. The press renders a public service although it is a private business which can only endure under the protection of free government. It may invoke constitutional protection in common with others. Government possesses power whereas the press wields influence. A free government and a free press are essential for either to survive. Government is charged with the duty of protecting the rights and liberties of all the citizens including "the press."

A government must have revenue. It is not a producer. Its income must be deribed by taxation in one form or another. Admittedly a tax, in any form or guise, is a burden yet that alone does not impair freedom of the press any more than an income or ad valorem tax will destroy freedom of speech to any other citizen. Many states rely entirely on ad valorem taxes for revenue. We have no knowledge of

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any case where a newspaper has been held immune from all forms of taxation. A state may choose to substitute a gross sales tax but in that case the relative burden on a newspaper would not be changed. In this case the City of Tampa has enacted a gross sales tax. Its application is general. The tax enacted is reasonable and its terms are not arbitrary.

Appellants rely strongly on Grosjean *v.* American Press Company, supra. The language of the opinion reveals an entirely different case from the one now before us. We quote from that opinion:

> "• • • It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press. • • •"
>
> "• • • The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. • • •"
>
> "• • • The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers. • • •"

The Grosjean case does not, in any sense, conflict with such eminent authority as Cooley on Taxation, Vol. 4. 4th Edition § 1707:

> "Newspaper publishers. Newspaper publishers may, without violating the constitutional provision in favor of the freedom of the press, be required to pay a

> license tax in respect of their business. And such a tax does not infringe a constitutional provision authorizing a tax upon business which cannot be reached by the ad valorem system."

We find no merit in the other contentions and affirm the decree.

Affirmed.

Thomas, C. J., Terrell, Buford, Chapman and Barns, J. J., Concur.

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Nos. 165 and 166. TAMPA TIMES CO. ET AL. *v.* CITY OF TAMPA. Appeals from the Supreme Court of Florida. *Per Curiam:* The appeals are dismissed for want of a substantial federal question. *Chester H. Ferguson* and *John Henry Lewin* for appellants. Reported below: 158 Fla. 595, 29 So. 2d 368, 371.